THEY THINK IT'S ALL OVER ……. IT SHOULD BE NOW

Mark Field considers the final steps of a mediation.

Somewhere in the city a church clock chimed six o'clock. James Reid ruminated over the events of the day. When his solicitor, Ken Diplock, had suggested a mediation, he had gone along with it. He was happy to try anything that could avoid the uncertainty and cost of the trial later in the year. He'd gone along with an open mind. That morning the mediator, Robert Goff, had explained how the day would proceed. He seemed optimistic that a settlement would be achieved. James had not shared his optimism. He felt that the business relationship between him and the defendant, Ian Fraser, was so broken that no bridges could be built. But he was far from disappointed to have been proved wrong.

But James's relief at an acceptable deal having been achieved was now tempered by anxiety that Ian would not stick to it. There was something comforting about going to a trial and the judge pronouncing the judgement and making the order, the parties knowing exactly where they stood. Was it going to be as final as that? Ken had gone off with Robert and Ian's solicitor, Richard Wilberforce, to do the drafting. James hoped that there was not going to be a problem between the solicitors in agreeing the wording.

He was reflecting on this when the door opened and Robert entered. Robert explained that the drafting of the document to give effect to the deal could take some time. He assured James that this was usual because what James and Ian had ultimately agreed was broad, covering every aspect of their business relationship as well as the costs of the litigation. James's claim was for the value of the unpaid goods that he had delivered to Ian under the distribution agreement between them. But now they had agreed that within specified periods some of the goods would be paid for by Ian and others returned to James. They had also agreed to changes to the distribution agreement, including it being terminated earlier than the original date. Then there were the costs. His fee for the mediation was a fixed fee payable under the Mediation Agreement so that formed no part of the litigation but there were the costs of the litigation, including the attendance at the mediation, which had been agreed in principle with the amounts to be determined subsequently.

Robert explained that as there were existing proceedings, Ken and Richard were drafting what lawyers call a "Tomlin Order", the effect of which would be to impose a stay on the existing proceedings and in a schedule to the Order would be set out all the terms of James's agreement with Ian.

Robert said that the drafting is always carried out by the lawyers but that he had initially remained in the room to help them focus on the draft; experience had taught him that sometimes the lawyers' adversarial tendencies were so strong that they attempted to use the drafting exercise to renegotiate what the parties had already agreed. Once the drafting had been completed, the schedule would be typed up; as the mediation was taking place at the offices of Richard's firm, there were facilities for this to be done quickly. The Tomlin Order of which the schedule formed part would then be signed by Ken and Richard and sent to the court to be sealed.

The Tomlin Order would have the same force and effect as an order forming part of a judgement of a court. If one party did not comply with the Tomlin Order, then the other would have the same entitlement to enforce it.

James was reassured by this but he still had a nagging doubt: was there no way that Ian could wriggle out of what had been agreed? Fortunately, Robert's response was what he wanted to hear: Ian could not change his mind once the solicitors had signed the Tomlin Order. At that point, the deal was done and dusted and there could be no going back. Actually, that seemed quite logical to James. Mediation was, after all, a voluntary process and Ian should be bound by what he had agreed, just as James felt himself to be.

This mediation process seems OK thought James. So he took the opportunity to pick Robert's brains. He asked him what happens where there is a dispute but proceedings have not yet been issued? It seemed to him to be unnecessary to have proceedings before the parties got round to a mediation. After all, everything that he and Ian had argued over during the course of the day could have been dealt with before proceedings had been issued. James thought that the next time he had a dispute it would be a good idea to try mediation first and litigation second. Robert agreed – the longer a dispute went on, the more entrenched the parties tended to become. So the earlier mediation is tried, the better.

Robert explained that where there were no proceedings the usual practice was for the parties to agree upon a Settlement Agreement. These would, if appropriately drafted, have the same effect as a contract; both parties would have obligations to perform under that contract and in the event of a breach by one party, the range of remedies for breach of contract would be available to the other party. But in straightforward monetary claims, the simplest way to give effect to an agreement that one party will pay money to the other is by what lawyers call a "Part 36 offer". "Part 36" was shorthand for one of the rules governing the conduct of legal proceedings but Robert told James that the rule was specifically worded to make it equally applicable to resolve disputes at a pre-proceedings stage. James jotted all this down and Robert said he was welcome to get in touch if he ever wanted more information or to discuss the suitability of mediation for a particular dispute. Sensing that their conversation had come to an end Robert said that he would go and see how the drafting was progressing in the other room …

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